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CITATIONS

Statutes:	
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Revenue Act of 1936, c. 690, 49 Stat. 1648:	
Sec. 501	11
Sec. 502	7, 12
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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 851

ROWAN COTTON MILLS COMPANY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Tax Court of the United States (R. 22–32) is reported at 1 T. C. 865. The opinion of the Circuit Court of Appeals (R. 72–80) is reported at 140 F. 2d 277.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 10, 1944 (R. 80). The petition for a writ of certiorari was filed on April 6, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the Commissioner is precluded by Section 272 of the Revenue Act of 1934 from asserting a deficiency in unjust enrichment tax for 1935 after the taxpayer's income and excess profits tax liability for that year has been finally settled by a decision of the Board of Tax Appeals.

STATUTES INVOLVED

The relevant statutory provisions are set forth in the Appendix, *infra*, pp. 10–14.

STATEMENT

The taxpayer is a North Carolina corporation, with its principal office and place of business at Salisbury, North Carolina. Its income and excess profits tax return and return for tax on unjust enrichment for the calendar year 1935 were filed with the Collector of Internal Revenue for the District of North Carolina. (R. 23.)

Taxpayer's income and excess profits tax return showed a net income of $82,232.48. The income tax and excess profits tax assessed thereon were in the amounts of $11,306.97 and $351.02, respectively. Under date of September 13, 1937, the Commissioner mailed to the taxpayer a notice of deficiency in income tax and excess profits tax for 1935 of $9,192.34 and $3,385.61, respectively. (R. 23.) Following an appeal by the taxpayer to the Board of Tax Appeals, the asserted deficiencies were increased to $15,812.26 and $5,792.86, respectively (R. 24).

There were numerous conferences between the taxpayer and representatives of the Commissioner relative to the correct income tax and excess profits tax liabilities for 1935 (R. 24). At these conferences, nothing was ever said by anybody about any liability of the taxpayer to "Tax on Unjust Enrichment" for 1935 under Title III of the Revenue Act of 1936 (R. 25).

Finally, an agreement was reached by the respective parties, based upon mutual concessions, and the following stipulation was filed with the Board of Tax Appeals on June 24, 1938 (R. 26):

> It is hereby stipulated and agreed that there is a deficiency in Federal income tax of $14,863.52 and a deficiency in excess-profits tax of $5,447.86 due from this petitioner for the taxable year 1935 and that the Board may enter its decision accordingly.

A decision to the above effect was entered by the Board under date of June 25, 1938, and the case was closed. The judgment, together with accrued interest less a related credit for overassessment of tax for 1936, was paid by the taxpayer on October 10, 1938, in the net amount of $14,637.38. (R. 26.)

In the meantime, the taxpayer's return for tax on unjust enrichment (Form 945) for the calendar year 1935 was filed on June 15, 1937. This return was filed pursuant to the provisions of Title III of the Revenue Act of 1936 and showed

no liability for such tax. No deficiency in tax on unjust enrichment had been determined by the Commissioner at the time of the conferences between the taxpayer and the Commissioner's representatives relative to the correct amounts of deficiencies in income tax and excess profits tax for 1935. (R. 26.)

When the Commissioner audited the taxpayer's return of tax on unjust enrichment for 1935 (filed June 15, 1937), he determined that the taxpayer had a liability of $33,969.97 for such tax, plus a penalty of $6,793.99 for delinquency in filing its return. The Commissioner mailed a notice of deficiency to taxpayer on May 12, 1941, and on July 14, 1941, the taxpayer filed its petition in the present proceeding. (R. 26–27.)

On June 2, 1942, the taxpayer filed a motion with the Board of Tax Appeals that the hearing in the first instance be limited to the question whether the Commissioner had authority to determine any deficiency in unjust enrichment tax for the year 1935 by reason of the fact that the taxpayer's income tax and excess profits tax liabilities for 1935 had been settled by the decision of the Board entered in Docket No. 91529 on June 25, 1938. The motion was granted on the date of filing and the evidence at the hearing on June 11, 1942, was limited accordingly. (R. 27.)

By order of the Board entered August 31, 1942, the case was restored to the general calendar for hearing upon all issues raised (R. 27).

On January 20, 1943, the taxpayer filed a "Motion and Plea" with the Tax Court electing "to stand on its plea to the jurisdiction either of the Commissioner or of this Court to find and determine any additional deficiency for the same said year 1935, and elects not to offer evidence on any other issue raised by the pleadings in this cause" (R. 27).

The Tax Court concluded that the Commissioner was not barred from asserting the deficiency in unjust enrichment tax (R. 32), and the Circuit Court of Appeals affirmed, except as to the penalty which is not here involved (R. 80).

ARGUMENT

The court below correctly ruled that the Commissioner was not precluded from determining a deficiency with respect to unjust enrichment taxes imposed under Title III of the Revenue Act of 1936 by reason of the fact that a deficiency of ordinary income taxes imposed under a different title had been finally approved by a decision of the Board of Tax Appeals. No conflict of authorities is asserted. The petition is predicated solely upon the alleged improper construction of a Section of a statute (sec. 272 (f) of the Revenue Act of 1934) to which the petitioner repeatedly refers without mentioning related Sections which are incorporated therein by reference.

The assertion is made (Pet. 11) that the Commissioner was barred by the language of Section

272 (f) of the Revenue Act of 1934 (Appendix, *infra,* pp. 10–11). But when Section 272 is read as a whole, it seems plain that Congress intended to restrict the issuance of further deficiency notices only with respect to the same type of tax, *i. e.,* "the tax imposed by this title," as specified in Section 272 (a) (Appendix, *infra,* p. 10).[1]

In Section 271 (a) (Appendix, *infra,* p. 10), a deficiency was defined as "The amount by which the tax imposed by this title exceeds the amount shown as the tax by the taxpayer upon his return." Again in Section 272 (a), it was made clear that Congress was there dealing only with "a deficiency in respect of the tax imposed by

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[1] The petitioner relies upon the language of a tentative draft of a proposed administrative code as indicating that the administrative construction of the existing law is contrary to the position taken here and as suggesting a legislative change for the future (Pet. 5–6, 12). Apart from the fact that the draft is tentative only, the language relied upon carries no such implications. Under the tentative draft, the administrative provisions are rearranged so that a single Section (Section 2604) deals with deficiencies in all taxes. Inasmuch as Section 2604 (a) refers to sending deficiency notices as to gift, estate and various forms of income taxes, it was necessary to phrase Section 2604 (b) in order to make it clear that the prohibition against a second deficiency notice was directed against the same tax as the first deficiency notice. Far from indicating a proposed change in the law, Section 2604 reflects the administrative construction of the existing law. Administrative construction is of course indicated by administrative practice and, in practice, returns filed under Title III of the Revenue Act of 1936 were audited by separate units of the Bureau of Internal Revenue and separate deficiency notices were sent (R. 79).

this title." When Congress then provided in Section 272 (f) that if the Commissioner once issued a notice of deficiency "as provided in subsection (a) of this section," no further deficiency notice could be issued "in respect of the same taxable year," it was restricting further action relating to the same tax, *i. e.,* "the tax imposed by this title," as specified in Section 272 (a).[2] Congress was not thereby precluding timely action with respect to excise taxes under Title IV of the 1934 Act, or capital stock taxes under Title V thereof, even though the liability might relate to the same taxable year. It seems all the more obvious that Congress did not intend by that general Section (sec. 272 (f)) to curtail the Commissioner's timely action with respect to the special unjust enrichment tax which was not even enacted until June 27, 1936, and was then set forth in a separate title (Title III) which embodied the special features necessarily attributable to this special tax. See Sections 502, 503,[3] 504, and 506 of the Revenue Act of 1936 (Appendix, *infra,* pp. 12–14).

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[2] The same observations are true with respect to the regulation referred to on page 4 of the petition.

[3] Section 503, relied upon by the petitioner (Pet. 4), actually confirms the administrative construction. If, as the petitioner urges, taxes under Title III were to be merged with Title I taxes, it would have been unnecessary to make separate provision in Title III for administrative procedure by incorporating therein by reference the Title I provisions. The court below properly observed that (R. 78):

> The inclusion by Congress in Title III of the procedural provisions for the determination of deficiencies by refer-

The court below, in rejecting the petitioner's claims, made the following clarifying analysis (R. 77):

> These contentions, however, do not touch the point that the procedure prescribed in § 272 of the Revenue Act of 1934 relates to taxes imposed by Title I of the Act, that is, income and excess profits taxes, while the procedure for additional income taxes, such as the windfall tax is prescribed by Title III of the Revenue Act of 1936. Section 272 (f) of the 1934 Act refers to the notice of deficiency prescribed in § 272 (a) which in terms applies to "a deficiency in respect of the tax imposed by this title." The windfall tax, although in its nature an income tax, is a separate and distinct tax. It had no existence when the Revenue Act of 1934 was passed or when the taxpayer's income tax return for the year 1935 was filed.

The decision of the Tax Court, as affirmed by the Circuit Court of Appeals, is sound and is in complete harmony with administrative practice. In the absence of a conflict of authorities, there is no basis for the issuance of the writ.

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ence to the analogous provisions in Title I of itself suggests that the windfall tax is a separate and distinct tax for which it was necessary to provide administrative procedure.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APRIL 1944.